No. 33038 - Susan M. Jackson, Administratrix of the Estate of Timothy J. Jackson v. The Putnam County Board of Education

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Davis, C.J., concurring, joined by Justice Maynard:

In this proceeding, the majority has affirmed the circuit court's order granting summary judgment to the Board. I agree with the decision and reasoning of the majority opinion. However, I have chosen to write separately in support of the majority's decision not to take judicial notice of the Board's Policy Manual.

Appellate Judicial Notice was Discretionary

Here, the appellant argued that, under the Board's Policy Manual, the decedent was required to be transported by bus to the campground. Since this did not occur, the Board violated the Policy Manual and proximately caused the decedent's death. The Policy Manual was not presented to the trial court. Thus, the appellant asked this Court to take judicial notice of the Policy Manual.[1] The majority opinion correctly refused to take judicial

[1]As pointed out in the majority opinion, this Court denied the appellant's request to supplement the record to add the Policy Manual in this appeal. *See Powderidge Unit Owners Ass'n v. Highland Props., Ltd.*, 196 W. Va. 692, 700, 474 S.E.2d 872, 880 (1996) ("[T]his Court for obvious reasons, will not consider evidence or arguments that were not presented to the circuit court for its consideration in ruling on [a] motion [for summary judgment]."). The dissenting opinion has quoted language from the order, denying appellant's request to supplement the record with the Policy Manual, which suggested that the Policy Manual was before this Court. Obviously, as known by the dissent, that language was in error because

notice of the Policy Manual.

The rules of this Court permit judicial notice to be taken of adjudicative facts[2]

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this Court denied the motion to supplement the record.

[2]The issue of judicial notice of adjudicative facts is addressed in Rule 201 of the West Virginia Rules of Evidence as follows:

> (a) Scope of Rule. This rule governs only judicial notice of adjudicative facts.
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> (b) Kinds of Facts. A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.
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> (c) When Discretionary. A court may take judicial notice, whether requested or not.
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> (d) When Mandatory. A court shall take judicial notice if requested by a party and supplied with the necessary information.
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> (e) Opportunity to Be Heard. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.
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> (f) Time of Taking Notice. Judicial notice may be taken at any stage of the proceeding.
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> (g) Instructing Jury. In a civil action or proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed. In a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any

or law.[3] Regardless of whether judicial notice is requested for adjudicative facts or law, Professor Cleckley has pointed out that "[i]t is discretionary with appellate courts to permit judicial notice where the matter was not first brought before the trial judge." Franklin D. Cleckley, Vol. 1, Handbook on Evidence for West Virginia Lawyers, § 2-1(E)(2) (4th ed. 2000).[4] Further, "it is inappropriate for appellate courts to take judicial notice of [local

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fact judicially noticed.

[3]The issue of judicial notice of law is addressed in Rule 202 of the West Virginia Rules of Evidence as follows:

> (a) When Mandatory. A court shall take judicial notice without request by a party of the common law, constitutions, and public statutes in force in every state, territory, and jurisdiction of the United States.
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> (b) When Discretionary. A court may take judicial notice without request by a party of (1) private acts and resolutions of the Congress of the United States and of the legislature of West Virginia and ordinances and regulations of governmental subdivisions or agencies of West Virginia and the United States; and (2) the laws of foreign countries.
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> (c) When Conditionally Mandatory. A court shall take judicial notice of each matter specified in paragraph (b) of this rule if a party requests it and (1) furnishes the court sufficient information to enable it properly to comply with the request and (2) has given each adverse party such notice as the court may require to enable the adverse party to prepare to meet the request.

[4]By statute it is mandatory for this Court to take judicial notice of local or private acts and resolutions of the Legislature that were relied upon by the trial court. *See* W. Va. Code § 57-1-2 (1923) (Repl. Vol. 2005) ("[A]n appellate court shall take judicial notice of [local or private acts and resolutions of the Legislature] as appear to have been relied on in the court below."). *See also* Syl. pt. 4, *Groves v. County Court of Grant County*, 42 W. Va. 587, 26 S.E. 460 (1896) ("This court takes judicial notice of all such acts and resolutions of the

agency documents] that were not noticed in the trial court." *Id*., at § 2-2(B). *See Vons Cos., Inc. v. Seabest Foods, Inc*., 14 Cal. 4th 434, 444 n.3, 58 Cal. Rptr. 2d 899, 905 n.3, 926 P.2d 1085, 1091 n.3 (1996) ("Reviewing courts generally do not take judicial notice of evidence not presented to the trial court.").

The issue of appellate court judicial notice of an agency's policy manual was addressed by the Court of Appeals of Oregon in *State v. Weems*, 190 Or. App. 341, 79 P.3d 884 (2003). *Weems* was a criminal case in which the defendant was convicted of possession of a controlled substance. The circumstances of defendant's arrest involved a minor traffic infraction.[5] During the investigation, the police learned that an outstanding arrest warrant had been issued for the defendant, and that the warrant was marked "caution." During the defendant's arrest on the warrant, the police patted him down for weapons. Although the patdown search did not reveal a weapon, the police searched the defendant's pockets and discovered a packet containing methamphetamine. When appealing the conviction, the defendant argued that the drugs found in his pockets should have been suppressed because the search was unlawful. The appellate court agreed with the defendant concluding that, once the patdown search did not reveal the presence of a weapon, the police should not have searched inside the defendant's pockets. The State argued that the search was lawful under

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legislature, though local and private, as appear to have been relied on in the court below.").

[5]The defendant's truck was parked with its rear in the way of traffic.

a police policy manual because the outstanding warrant was marked "caution." Insofar as the policy manual was not presented to the trial court during the defendant's motion to suppress, the State asked the appellate court to take judicial notice of the manual. In reversing the defendant's conviction because of the unlawful search, the appellate court rejected the State's judicial notice argument as follows:

> In support of its argument that a search was justified, the state has requested that we take judicial notice of a section from the Law Enforcement Data System (LEDS) Operating Manual that defines under what circumstances a "caution" indicator will be assigned to a warrant. The LEDS document was not presented to the trial court. [The police officer] did not testify as to whether she was relying on the definition of "caution" given in the LEDS manual when she searched defendant. We deny the state's motion to take judicial notice of the LEDS document.

Weems, 190 Or. App. at 347, 79 P.3d at 887. *See also People v. Huntsman*, 152 Cal. App. 3d 1073, 1086, 200 Cal. Rptr. 89, 97 (1984) ("[T]he Attorney General . . . asked us to take judicial notice of the asserted fact that eight-by-eleven-inch plastic bags with 'Zip-Loc' tops are often used in narcotics transactions. We decline the request. . . . [I]n passing on the legality of a motion to suppress, it is the job of an appellate court to review evidence submitted on the motion in the trial court. No request for judicial notice was made there."); *State v. McCarthy*, 197 Conn. 247, 249 n.2, 496 A.2d 513, 515 n.2 (1985) ("The defendant . . . urges this court to take judicial notice of results of the final 1980 census. . . . We decline to take judicial notice of facts that were not available . . . at the time of trial. To hold otherwise would be to permit a party to appeal a case on a basis completely different from

that presented below, essentially rendering the lower court decision superfluous."); *Hayes v. State*, 488 So. 2d 77, 81 n.3 (Fla. Dist. Ct. App. 1986) ("[A]ppellee, State of Florida, filed a request for us to take . . . judicial notice that . . . the Punta Gorda Police Department had possession of an F.B.I. report which showed that [defendant] had an arrest record in 1972. . . . We decline to take such judicial notice in rendering this decision since we must rely upon the record of the facts as they were revealed to the trial court."); *Brant v. Rosen*, No. 5-04-0516, 2007 WL 1246973, at *9 (Ill. App. Ct. Apr. 27, 2007) ("We decline to take judicial notice of these documents when they were never submitted to the trial court."); *Williams v. Williams*, 17 S.W.3d 559, 561 n.4 (Mo. Ct. App. 1999) ("[W]e agree with the dissent that we could take judicial notice of life expectancy and annuity tables . . ., but we decline to . . . because the record demonstrates that it was not raised before the trial court."); *State v. Gagnon*, No. 2006-373, 2007 WL 1362902, at *3 (N.H. May 10, 2007) ("[W]e decline to use the budget as a source to take judicial notice for the first time on appeal . . . because we decline to exercise our discretion on matters not presented to the trial court."); *Snyder v. Snyder*, No. 99-G-2230, 2000 WL 1876614, at *10 (Ohio Ct. App. Dec. 22, 2000) ("We decline to now take judicial notice of a fact which was not drawn to the attention of the trial court."); *Masters v. Rodgers Dev. Group*, 283 S.C. 251, 256, 321 S.E.2d 194, 197 (Ct. App. 1984) ("Appellate courts are generally reluctant to notice adjudicative facts. . . . Notice of 'facts' for the first time on appeal may deny the adverse party the opportunity to contest the matters noticed; it may also violate the general principle that appellate review should be limited to the record." (citations omitted)); *Stephens v. Dallas Area Rapid Transit*, 50 S.W.3d

621, 634 (Tex. App. 2001) ("Appellee . . . has requested this Court to take judicial notice of . . . its personnel policy manual. Because these portions of the manual were not before the trial court, they would not properly be before us even if we took judicial notice of them. We decline to take judicial notice . . . of the . . . personnel policy manual."); *Finlayson v. Finlayson*, 874 P.2d 843, 847-48 (Utah Ct. App. 1994) ("With very limited exceptions, judicial notice should not be used to get around the rule precluding raising issues for the first time on appeal. . . . We therefore decline to take judicial notice, given there is no compelling countervailing principle to be served in taking such notice and given the trial court supported its conclusion with evidence not related to the [issue in question]").

It is clear from the above authorities that the majority opinion correctly declined to take judicial notice of the Board's Policy Manual. As one court noted, "an appellate court is naturally reluctant to take judicial notice of matters . . . promulgated by . . . agencies when the trial court was not requested to do so and was not given an opportunity to examine the necessary source material." *Sparkman v. Maxwell*, 519 S.W.2d 852, 855 (Tex. 1975).

Based upon the foregoing, I respectfully concur. I am authorized to state that Justice Maynard joins me in this concurring opinion.